

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

and

COMMONWEALTH OF
MASSACHUSETTS,

Applicant for Intervention,

v.

CITY OF GLOUCESTER,
MASSACHUSETTS,

Defendant.

CIVIL ACTION NO.

**ASSENTED TO MOTION OF THE
COMMONWEALTH OF MASSACHUSETTS TO
INTERVENE AS PLAINTIFF**

Pursuant to Fed. R. Civ. P. 24(a)(1) and Section 505(b)(1)(B) of the Federal Water Pollution Control Act (“Clean Water Act” or “CWA”), 33 U.S.C. §§ 1365(b)(1)(B), the Commonwealth of Massachusetts, acting by and through the Department of Environmental Protection and the Massachusetts Attorney General, hereby moves for leave to intervene as a plaintiff in this action, as of right, to assert the claims set forth in the Complaint submitted herewith.

In support of this motion, the Commonwealth states as follows:

1. CWA Section 505(b)(1)(B) provides to any citizen a statutory, unconditional right to intervene in a civil action brought by “the Administrator” of the EPA, in a court of the United States, to require compliance with the Clean Water Act. 33 U.S.C. § 1365(b)(1)(B).
2. The United States of America, through the United States Attorney General at the request of the Acting Administrator of the United States Environmental Protection Agency

(“EPA”), brought this action against the City of Gloucester, Massachusetts, pursuant to CWA Sections 309(b) and (d), 33 U.S.C. §§ 1319(b) and (d), seeking, among other things, the City’s compliance with the Clean Water Act, in relation to the operation of the City’s publicly-owned treatment works to collect and treat sanitary sewage and other wastewater.

3. In a Complaint submitted herewith, the Commonwealth alleges claims against the City for numerous violations of the Clean Water Act and asserts supplemental state law claims for numerous violations of the Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26-53, (“Massachusetts Act”) and the regulations promulgated thereunder at 314 C.M.R. §§ 3.00, *et seq.*, 7.00, *et seq.*, and 12.00, *et seq.* The Commonwealth seeks injunctive relief and civil penalties under federal and state law.

4. The Commonwealth is a “citizen” within the meaning of the Clean Water Act, and, therefore, has an unconditional right to intervene in this action.

5. In addition, CWA Section 309(e), 33 U.S.C. § 1319(e), provides that whenever the United States brings a civil enforcement action against a municipality under the Clean Water Act, the State in which the municipality is located shall be joined as a party. The City of Gloucester is a municipality within the Commonwealth.

6. The Commonwealth is a party to the Consent Decree lodged by the United States in this action. That Consent Decree partially resolves claims alleged in the Complaint submitted herewith.

7. The Parties to this action, the City and the United States, through counsel, have assented to this motion.

For the foregoing reasons, this Court should grant leave to the Commonwealth to intervene, as of right, as a plaintiff in this action.

Respectfully Submitted,

COMMONWEALTH OF MASSACHUSETTS

By its attorney,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

/s/ I. Andrew Goldberg

I. Andrew Goldberg, BBO# 560843
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108



Dated: February 6, 2023

CERTIFICATION OF CONSULTATION

Counsel to the Commonwealth in this action hereby certifies that pursuant to Local Rule 7.1(a)(2) of this Court he has conferred with counsel for the defendant City of Gloucester and counsel for the plaintiff United States of America regarding the contents of the foregoing motion and that all parties have assented.

Dated: February 6, 2023

/s/ I. Andrew Goldberg
I. Andrew Goldberg

CERTIFICATE OF SERVICE

Counsel to the Commonwealth in this action hereby certifies that with the electronic filing of this motion all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

/s/ I. Andrew Goldberg
I. Andrew Goldberg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

and

COMMONWEALTH OF
MASSACHUSETTS,

Plaintiff-Intervenor,

v.

CITY OF GLOUCESTER,
MASSACHUSETTS,

Defendant.

CIVIL ACTION NO.

PLAINTIFF-INTERVENOR'S COMPLAINT

DESCRIPTION OF CASE

1. The defendant the City of Gloucester, Massachusetts (“Gloucester” or the “City”), owns and operates the Gloucester Water Pollution Control Facility (“WPCF”), a municipal wastewater treatment facility located at 50 Essex Avenue, Gloucester. The plaintiff-intervenor Commonwealth of Massachusetts (the “Commonwealth”) brings claims against the defendant for its operations of the WPCF in violation of the Federal Water Pollution Control Act (the “Clean Water Act” or “CWA”), 33 U.S.C. §§ 1251, et seq., and supplemental state law claims for violating the Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26-53 (the “Massachusetts Act”), and the regulations promulgated under the Massachusetts Act at 314 C.M.R. §§ 3.00, et

seq., 7.00, et seq., and 12.00, et seq. The Commonwealth seeks injunctive relief and civil penalties under federal and state law.

JURISDICTION/VENUE/NOTICE

2. This Court has subject matter jurisdiction over the parties and the subject matter of this action pursuant to Section 505(a)(1)(A) of the Act, 33 U.S.C. § 1365(a)(1)(A), 28 U.S.C. § 1331 (an action arising under the laws of the United States), and 28 U.S.C. § 1367 (supplemental jurisdiction over related state claims).

3. Venue is proper in this district pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and pursuant to 28 U.S.C. §§ 1391(b) and (c), and 28 U.S.C. § 1395.

4. Notice of the commencement of this action has was given to the Commonwealth pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

PARTIES

5. The defendant City of Gloucester is a municipality within the meaning of Section 502(4) of the CWA, 33 U.S.C. § 1362(4), and a person within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

6. The Intervening Plaintiff Commonwealth of Massachusetts is a sovereign state of the United States, acting in this matter by and through the Massachusetts Department of Environmental Protection (“MassDEP”) and the Massachusetts Attorney General. MassDEP, which has offices at One Winter Street, Boston, Massachusetts, is the agency of the Commonwealth primarily responsible for administering various environmental statutes, including the Massachusetts Act. The Massachusetts Attorney General, who has her office at

One Ashburton Place, Boston, Massachusetts, is the chief legal officer of the Commonwealth.

She is authorized to bring this action and to seek the relief requested pursuant to M.G.L. c. 12, §§ 3 and 11D, and M.G.L. c. 21, §§ 42 and 46.

7. Section 309(e) of the Act, 33 U.S.C. § 1319(e), provides:

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment or any expenses incurred as a result of complying with any such judgment entered against the municipality in such action, to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

8. The Commonwealth of Massachusetts is seeking to join this action pursuant to Section 309(e) of the CWA, 33 U.S.C. § 1319(e), as an intervening plaintiff.

STATUTORY AUTHORITY

A. Federal Clean Water Act

9. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters of the United States except in compliance with the terms and conditions of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

10. Section 402 of the Act, 33 U.S.C. § 1342, provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of any pollutant into the navigable waters of the United States upon such specific terms and conditions as the Administrator may prescribe.

11. Section 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), authorize the commencement of an action for civil penalties and injunctive relief against any person who

violates Section 301(a) of the CWA, 33 U.S.C. § 1311(a), or any condition or limitation in a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342.

12. Section 402 of the CWA, 33 U.S.C. § 1342, provides that the Administrator may issue permits under the NPDES program for the discharge of pollutants into navigable waters of the United States upon such specific terms and conditions as the Administrator may prescribe.

13. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term “discharge of pollutants” to include “any addition of any pollutant to navigable waters from any point source.”

14. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines the term “pollutant” to include, *inter alia*, “sewage . . . , biological materials . . . , and . . . municipal . . . waste discharged into water.”

15. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term “navigable waters” as “the waters of the United States, including the territorial seas.” Waters of the United States” has been further defined to include, among other things, waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, and tributaries of such waters. 40 C.F.R. § 122.2 (1993).

16. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines the term “point source” to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged.”

17. Section 402 of the CWA, 33 U.S.C. § 1342, provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of pollutants into navigable waters upon such specific terms and conditions as the Administrator of EPA may prescribe.

B. Massachusetts Clean Waters Act

18. Section 43(2) of the Massachusetts Act, M.G.L. c. 21, § 43(2), prohibits a person from discharging pollutants into waters of the Commonwealth without a valid permit issued by MassDEP pursuant to Chapter 21 of the Massachusetts Act.

19. Under regulations at 314 C.M.R. 3.02, 7.02, and 12.02, “discharge of pollutants” means “any addition of any pollutant or combination of pollutants to waters of the Commonwealth from any source.” Under Section 26A of the Massachusetts Act, M.G.L. c. 21, and 314 C.M.R. 3.02, 7.02, and 12.02, “waters of the Commonwealth” means “all waters within the jurisdiction of the Commonwealth, including . . . rivers and ground waters.”

20. Section 43(7) of the Massachusetts Act, M.G.L. c. 21, § 43(7), requires that every permit specify effluent limitations, requirements for proper operation and maintenance, monitoring, sampling, and reporting. Regulations at 314 C.M.R. 3.00, *et seq.*, 7.00, *et seq.*, and 12.00, *et seq.*, establish requirements and procedures for the Commonwealth’s discharge permit program, for sewer system extensions and connections, and for operation and maintenance of wastewater treatment works.

FACTS

21. EPA issued NPDES Permit No. MA0100625 (“the Permit”) to the City of Gloucester for the WPCF with effluent limits based on primary treatment, pursuant to a modification it granted to the City under Section 301(h) of the CWA, 33 U.S.C. § 1311(h) (hereinafter, “Section 301(h) modification”), on June 26, 1985. EPA thereafter reissued the Permit, again with a Section 301(h) modification, on August 28, 2001, which became effective on October 27, 2001, and expired on October 27, 2006. The Section 301(h) modification allowed

the Permit to include effluent limits based on primary rather than secondary treatment standards.

22. The City applied for renewal of its Permit and Section 301(h) modification on May 26, 2006, and the Permit was administratively continued under 40 C.F.R. §122.6.

23. On November 5, 2010, EPA issued a Tentative Denial of the application for renewal of the Permit's Section 301(h) modification under 40 C.F.R. § 125.59(h), together with a Draft NPDES permit with effluent limits based on secondary treatment. In the absence of a Section 301(h) modification, the WPCF is subject to the CWA's secondary treatment requirements that generally apply to publicly owned treatment works. 33 U.S.C. § 1311(b)(1)(B); 40 C.F.R. § 125.3(a)(1)(i). Secondary treatment is the removal of pollutants such as suspended solids and organic matter from wastewater, typically through physical and biological processes, in order to meet technology-based standards for biological oxygen demand ("BOD") and total suspended solids ("TSS").

24. After consideration of the issues and public comment, EPA decided both to deny the City's application for renewal of its Section 301(h) modification and to issue the City the Final NPDES Permit ("Final Permit") with effluent limits based on secondary treatment. *See* 33 U.S.C. § 1311(b)(1)(B); 40 C.F.R. Part 133. EPA issued and signed the Final Permit on June 30, 2022, and it became effective as of September 1, 2022. On July 1, 2022, EPA also signed a document memorializing its final denial of the City's request for renewal of its Section 301(h) modification.

25. The Final Permit authorizes the City to discharge pollutants from Outfall 001 of the WPCF subject to the effluent limitations, monitoring requirements, and other conditions specified in the Final Permit, such as, among other requirements, limits for BOD (30 mg/L

monthly average and 45 mg/L weekly average), BOD % removal $\geq 85\%$), TSS (30 mg/L monthly average and 45 mg/L weekly average), TSS % removal $\geq 85\%$), whole effluent toxicity (“WET”) ($LC_{50} \geq 100\%$), oil and grease (non-detect), total petroleum hydrocarbons (“TPH”) (non-detect), fecal coliform (14 MPN/100 mL monthly average and 28 MPN/100 mL), and enterococci bacteria (35 MPN/100 mL monthly average and 130 MPN/100 mL).

26. Information provided by the City demonstrates that, as currently configured, the WPCF’s discharge is unable to meet BOD, TSS, WET, oil and grease, TPH, or bacteria limits set by the Final Permit until such time as WPCF upgrades are completed.

27. At all times relevant to this action, the Final Permit has authorized the City to discharge wastewater from Outfall 001 at the WPCF to Massachusetts Bay.

28. Effluent discharged from the WPCF adds TSS, oil and grease, TPH, and bacteria to, and increases the BOD and WET of, Massachusetts Bay. and, therefore, constitutes a “discharge of pollutants” as defined in Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

29. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes the Administrator to commence a civil action to obtain appropriate relief, including a permanent or temporary injunction, when any person violates Section 301 of the CWA, 33 U.S.C. § 1311, or any condition or limitation in an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. The United States Department of Justice has authority to bring this action on behalf of EPA pursuant to Section 506 of the CWA, 33 U.S.C. § 1366.

30. Under Section 309(d) of the CWA, 33 U.S.C. § 1319(d), together with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461, and 40 C.F.R. § 19.4, any person who violates

Section 301 of the CWA, 33 U.S.C. § 1311, or any condition or limitation contained in a NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty not to exceed \$59,973 per day for each violation which takes place after November 2, 2015. *See* 87 Fed. Reg. 1676 (Jan. 12, 2022).

COUNT ONE
(NPDES Permit Violations)

31. The Commonwealth realleges and incorporates by reference the allegations of paragraphs 1 through 30 above.

32. Outfall 001 is a point source within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

33. Massachusetts Bay is a navigable water of the United States within the meaning of Section 503(7), 33 U.S.C. § 1362(7).

34. The effluent discharged from the Outfall 001 into Massachusetts Bay contains TSS, oil and grease, TPH, and bacteria, and increases the BOD and WET of the receiving waters, all of which are “pollutants” as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12), and, therefore, constitutes a “discharge of pollutants” as defined in Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

35. As set forth above, the City has discharged pollutants as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12), into navigable waters of the United States.

36. In doing so, the City has violated, and will continue to violate one or more of the effluent limits for the pollutants described above, until construction of secondary treatment at the WPCF is complete. Each violation of a permit condition is a separate violation of the NPDES Permit, and each day of discharge is a separate violation.

37. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, the City is liable for injunctive relief and for civil penalties not to exceed \$59,973 per day for each violation.

**FIRST SUPPLEMENTAL CLAIM FOR RELIEF UNDER STATE LAW:
INJUNCTIVE RELIEF AND CIVIL PENALTIES FOR
PROHIBITED DISCHARGES IN VIOLATION OF M.G.L. c. 21**

38. The Commonwealth realleges and incorporates by reference the allegations of paragraphs 1 through 37, above.

39. The City is a “person” within the meaning of M.G.L. c. 21, § 26A, and 314 C.M.R. §§ 3.02, 7.02, and 12.02.

40. The wastewater from the City’s WPCF contains “pollutant[s],” as defined in M.G.L. c. 21, § 26A, and 314 C.M.R. §§ 3.02, 7.02, and 12.02, and is discharged to the “waters of the Commonwealth” as defined in M.G.L. c. 21, § 26A, and 314 C.M.R. §§ 3.02, 7.02, and 12.02.

41. As set forth above, the discharges of wastewater to Massachusetts Bay from the WPCF caused or contributed to violations of the Massachusetts surface water quality standards, 314 C.M.R. 4.00 (“Massachusetts WQS”) in violation of the Massachusetts Act.

42. As set forth above, the City’s discharges caused or contributed to water quality violations in Massachusetts Bay.

43. As set forth above, the City’s discharges to Massachusetts Bay that contained other pollutants in concentrations exceeding the limits set forth in the Gloucester NPDES Permit and that caused or contributed to water quality violations in Massachusetts Bay violated the City’s

NPDES Permit, Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), and the Massachusetts WQS, all in violation of the Massachusetts Act.

44. Pursuant to Sections 42 and 46 of the Massachusetts Act, M.G.L. c. 21, §§ 42 and 46, for each day of each violation of the NPDES Permit, Section 43 of the Massachusetts Act, or regulations promulgated under the Massachusetts Act, the Commonwealth is entitled to injunctive relief and the assessment of civil penalties of up to the amount of \$50,000.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff-intervenor the Commonwealth of Massachusetts respectfully requests that this Court grant the following relief:

1. Enter judgment against the City in favor of the Commonwealth;
2. Grant a permanent injunction enjoining the City pursuant to Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b), from any and all future violations of the Clean Water Act and from discharges of pollutants except as authorized by a NPDES permit issued pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342;
3. Issue an order for the City to comply with all requirements of the Final Permit;
4. Issue an order that the City pay a civil penalty as appropriate pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), with such penalty level adjusted pursuant to 50 C.F.R. § 19.4, for the federal Clean Water Act violations alleged herein;
5. Issue an order that the City pay a civil penalty as appropriate and not to exceed the amount of up to \$50,000 for each day of each violation of the NPDES Permit and Section 43 of the Massachusetts Act, M.G.L. c. 21, § 43;

6. Award the Commonwealth all costs and disbursements to maintain this action; and

7. Grant such other relief as the Court deems just and proper.

Respectfully Submitted,

COMMONWEALTH OF MASSACHUSETTS

By its attorney,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

/s/ I. Andrew Goldberg

I. Andrew Goldberg, BBO# 560843
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Dated: February 6, 2023

CERTIFICATE OF SERVICE

I hereby certify that with the electronic filing of this motion all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

/s/ I. Andrew Goldberg
I. Andrew Goldberg